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U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
Washington, D.C. 20590

January 11, 2001

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

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Public Record

Re: Ex Parte No. 582 (Sub-No. 1)

Dear Secretary Williams:

Enclosed herewith are the original and twenty-five copies of the Rebuttal Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Parties of Record

ORIGINAL

Before the
Surface Transportation Board
Washington, D.C.

Major Rail Consolidation Procedures	)	Ex Parte No. 582 (Sub-No. 1)

Rebuttal Comments of the
United States Department of Transportation

I. INTRODUCTION

The United States Department of Transportation ("DOT" or "Department") welcomes this final opportunity to comment on various views expressed in the most recent round of comments in this proceeding. We will use this rebuttal round to clarify our position on competition and enhanced access (which appears to have been misconstrued by several parties), as well as to offer additional views on environmental, transnational, and labor issues.

II. COMPETITION ISSUES

Several of DOT's statements regarding the Board's proposal for enhanced competition have been cited by the Norfolk Southern Railway Co. ("NS") to support its own (and, by its account, the rail industry's) position on this issue. NS believes that the Board should restrict its attention in merger reviews to "the identification and amelioration of direct competitive harms resulting from the transaction" – and the carrier further maintains that DOT is in substantial agreement with that view, *i.e.*, endorsing competitive enhancements only if identified harms cannot be remedied directly, and if they are not outweighed by anticipated public benefits from the transaction. NS Reply Comments at 5-7, 11. NS misunderstands DOT's position on the enhanced competition issue.

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With regard to the specific merger transactions to which NS refers, the Department sought reassurance that the Board did not intend to assume, *a priori*, that there would always be competitive problems associated with a merger that could not be remedied directly through conditions. In the event there were such a case -- where a proposed merger would result in anticompetitive effects that were not directly redressable by customary types of conditions -- we recommended that undertakings to enhance competition be directed, first, to those shippers that would suffer the unremedied competitive losses. DOT Comments at 4. However, DOT's support for the STB's enhanced competition proposal is not confined to situations where customary remedies are not feasible.

The Department believes that the Board's intent in requiring merger applicants to propose ways of enhancing competition was not just to remedy competitive problems, but also to bolster the public benefits associated with the merger. As stated previously, we support the judicious use of such enhancements to provide public benefits, as there will be few economies of scale and density providing public benefits in the end-to-end transcontinental mergers likely to be proposed. Id. at 2-4; DOT Reply Comments at 4-5.

Requiring that major gateways and routes be kept open, physically and economically, and mandating reciprocal switching in terminal areas are examples of the judicious use of competition enhancements that deliver significant public benefits. Espousal of such measures does not amount to what NS terms "forced access" to additional carriers for all shippers. As stated in prior filings, DOT believes the competitive access issue should be addressed in a separate, industry-wide rulemaking, and has proposed consideration of an approach to pricing such access that at once assures direct access for an efficient competitor and is consistent with the industry's need for differential pricing to recover full costs. DOT Comments at 6-7; DOT Initial Comments (filed May 16, 2000) at 16.

III. LABOR ISSUES

The Department will direct its rebuttal comments in this area to "cramdown" issues, and primarily to the reply comments of the National Railway Labor Conference ("NRLC") regarding the Board's authority to regulate the override of collective bargaining agreements. The NRLC makes the blanket assertion that the Board lacks the authority to vary in any way the "necessity" standard applicable to the modification of collective bargaining agreements. NRLC Reply Comments at 1-2. The NRLC requests the Board to delete the third sentence in proposed Section 1180.1(e), which states in pertinent part that the Board "will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction." Id. at 1.

The third sentence of proposed Section 1180.1(e) -- contrary to the assertions of the NRLC (Id. at 2) -- is patently consistent with the public interest, which includes the protection of employee rights. In addition, the change in policy proposed by the Board would pose no threat to the public transportation benefits of a merger, as alleged by the NRLC, if the standard of necessity established in the *City of Palestine* case were to be used to permit the override of provisions of collective bargaining agreements that presented an actual obstacle to the transaction.

The NRLC's own reasoning lacks cohesion. On the one hand, when arguing that the Board lacks authority to review its standard of necessity, the NRLC contends that the existing standard of necessity was somehow frozen by Congressional action (or lack of action) in 1995 because the controlling provisions were reenacted with knowledge of the ICC's longstanding policy with respect to modification of labor contracts. Id. at 4. However, later in its comments (when attacking the Department's proposal to apply the standard of necessity found in the *City of Palestine* case), the NRLC cites a "recent decision" dated September 25, 1998, as the final word regarding "the issue of what constitutes 'necessity' for

modifying a collective bargaining agreement." Id. at 8. That recent decision, known as *Carmen III,* describes in detail the several policy shifts executed by the STB and its predecessor regarding the standard of necessity for overriding collective bargaining agreements. These policy changes include the enunciation of the *Denver & Rio Grande Western Doctrine* in 1983, which lowered the threshold criteria for modifying collective bargaining agreements, and the Board's recent 1998 decision to raise the threshold for the override of collective bargaining agreements by reverting to the policy in effect between 1940 and 1980. Finance Docket 28905 (Sub-No. 22), CSX Corp. - Control - Chessie Systems Inc, (September 22, 1998) at 3-15. Just as the Board can conclude "that it is appropriate to require merger applicants to bear a heavier burden to show that a major merger proposal is in the public interest," it also can determine that it "will look with extreme disfavor on overrides of collective bargaining agreements." Notice of Proposed Rulemaking at 10 and 17, respectively.

There is a basic principle at stake here: distinguishing which proposals to override contract provisions are properly within the sphere of labor relations and which are within the sphere of the Board's authority. The guiding axiom that the STB should adopt is that the burden should be on the party making the proposal to show that the contract provision presents a clear obstacle to the implementation of the approved transaction. That is the standard set forth in the *City of Palestine* case. Any lesser standard bestows on the applicant carriers the equivalent of a complication-free bypass to normal collective bargaining.

The NRLC in a footnote (NRLC Reply Comments at 1, n. 1) appears to obfuscate a point made by the Department regarding the subset of Class I carriers that have entered into an agreement with the United Transportation Unions ("UTU") concerning cramdown. DOT simply suggests that the Board review the signatory page of the agreement, which lists those Class I railroads that are party to the agreement with the UTU.

In another footnote (Id. at 9 n. 6), the NRLC incorrectly contends that the

Transportation Communications International Union ("TCU") did not continue the proposal that the necessity standard should distinguish between contract provisions that are burdens to a transaction and contract provisions that are obstacles to a transaction. We refer the Board to the most recent submission of the Rail Labor Division ("RLD"), which shows that the TCU has joined with the RLD in a joint filing. RLD Reply Comments at 1, n.1. The RLD filing clearly demonstrates support for the *City of Palestine* standard of necessity. Id. at 8.

CSX Transportation Co. ("CSX") also raises many of the points made by the NRLC regarding cramdown. CSX Reply Comments at 51-61. The Department disagrees with the conclusions of CSX for the reasons stated above.

The CSX discussion of the agreement with the UTU on cramdown, and the analogy to the Federal Railroad Administration's ("FRA's") approach to negotiated rulemaking, also requires clarification. CSX Reply Comments at 52. CSX appears to argue that not all carriers participate in FRA's successful negotiated rulemaking process, and, therefore, it is not necessary that all carriers or all unions be party to the agreement with the UTU on cramdown. Id. at 52-53. The flaw in this analogy is that at the end of the negotiated rulemaking process, all carriers are covered by the rule, whether they participated in the rulemaking or not. Under the terms of the voluntary agreement between some Class I carriers and the UTU, those carriers and unions that are not signatory to the agreement are not covered by its terms.

IV. ENVIRONMENTAL ISSUES

In response to the Department's previous recommendation that the rights and responsibilities of communities negotiating environmental settlements with applicants be clarified, the Association of American Railroads ("AAR") counters that it "does not believe there is any credible basis on which the Board can meaningfully catalogue community rights and responsibilities, nor is there any reason why the Board should endeavor to spell out the rights of one set of parties

to these negotiations." AAR Reply Comments at 19-20. This position does not consider that the "rules of the game" are heavily stacked against most small communities that seek to negotiate mitigation measures.

Applicant railroads are fully aware of the specific changes in railroad operations they are proposing. They also well understand the overall application process, including the environmental component, as well as likely mitigation measures that may be ordered by the STB. Many affected communities, on the other hand, have little or no knowledge of the Board and its procedures, applicable STB environmental regulations, or precedent established in prior cases. Compounding this lack of knowledge, the communities to which DOT refers are small, have limited legal staffs, and often are not aware of the potential impacts until fairly late in the process. Although the Board does a commendable job in notifying these communities, the Department believes that the public interest would be better served if more information was made available to the communities at the beginning of the process. This might take the form of a handbook, or it might involve more specific requirements on the part of the applicants to notify and inform the affected communities.

DOT commented in its most recent filing on the proposal put forward by the Burlington Northern and Santa Fe Railway Co. ("BNSF") to reduce the time to process major merger applications. In particular, we noted that reducing the time allocated for the preparation of an environmental impact statement would first require consideration of the impact upon these smaller communities, which need sufficient time to become aware of the issues and of their options. DOT Reply Comments at 7-8.

Efforts to make smaller communities better informed earlier in the process will also result in a more fair process. DOT disagrees with the AAR's implication that it is somehow unfair to spell out the rights these communities might have. The goal should be to expeditiously decide the merits of the application and,

wherever necessary, to order appropriate mitigation in a fair and expeditious manner. Better information would facilitate, not harm, the process.

The AAR also opposes the Department's suggestion that the Board require merger applicants "to provide up-to-date data to the DOT/AAR Highway-Rail Crossing Inventory for all crossings on the merged system." AAR Reply Comments at 20. DOT agrees with AAR that the bulk of these data are supplied by state highway agencies, and that they are often slow to provide new traffic data. This is regrettable, but it is not a reason to fail to update train counts, number of tracks, and other important data for the system when applying for a major transaction.

The FRA, in assessing the Safety Integration Plan, and DOT, in generally reviewing the environmental impacts of a transaction, should have the most accurate data available. Much of these data would be included in the operating plan in any event, and providing it directly would not add to the railroads' burden and would help to ensure a safer transaction. Railroads should be required to update the fields of the inventory, to submit the electronic updates directly to DOT/FRA and to the respective state agencies, and to request the state agencies to update the highway-related data and submit those data to DOT/FRA. DOT, through FRA and the Federal Highway Administration, regularly encourages frequent updates to the inventory. Encouragement or direction from the Board in the context of transactions will assure better allocation of resources and will permit FRA to assist the Board in verifying that this is the case.

V. TRANSNATIONAL ISSUES

U.S.-based parties addressing the issue continue to support the Board's proposals to obtain additional information for major transnational rail consolidations. A few parties, notably Canada's Class I carriers, again maintain that there is no basis in law or in fact for such provisions. *See* Reply Comments

of Canadian National Railway Co. ("CN") at 20-30; Canadian Pacific Railway Co. ("CP") at 13-20. The Department disagrees with CN and CP.

The transactions to which the regulations adopted in this proceeding will apply could be unprecedented in size. The implications of any transcontinental mergers resulting in unified control of a vast portion of the U.S. rail infrastructure are unknown, and thus must be fully explored. Such uncertainty is the very basis for "raising the bar" of merger standards generally. It also militates against simply reacting to only those issues raised by individual parties.

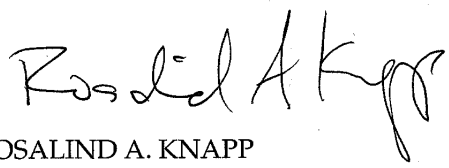
Consolidations of this scope that involve a foreign rail carrier introduce another dimension to this uncertainty that is simply not present in consolidations between U.S. carriers: whether and to what extent foreign law or policy governing a foreign carrier will affect the public interest. Regardless of whether the results of this inquiry turn out to be virtually non-existent or extremely profound, they must first be explored. The informational requirements supported by DOT serve this purpose and do not contravene the North American Free Trade Agreement or other international compact.

Some of the animus against these proposals may stem from a concern that they arise from a protectionist impulse. The Department's intent, however, is simply to assure a "level playing field" for competing commercial interests, not to erect a barrier that tips the scales against foreign commercial interests. DOT Reply Comments at 9. U.S. carriers seeking to merge with each other or to compete with a merged railroad either already enjoy a level playing field, or can be assured of one by exercise of the Board's authority. Similarly, rail shippers in the U.S. are protected in consolidations of purely domestic carriers. It is unknown whether that is the case with major foreign carriers potentially subject to legal or policy imperatives with which the Board and U.S. participants may be unfamiliar. Gaining familiarity with those factors is critical to prudent decision-making.

VI. CONCLUSION

Once again, the Department commends the Board for its decision to undertake such a wide-ranging and thorough review of the rail merger criteria. New, more stringent, standards will be essential in ensuring that the rail transportation infrastructure of the 21st century meets the needs of the industry, its customers, its employees, communities, and the general public. We urge the STB to work carefully but expeditiously to develop the final rules in this proceeding.

Respectfully submitted,



ROSALIND A. KNAPP
Acting General Counsel

January 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served on all Parties of Record by first-class mail, postage prepaid, a copy of the foregoing Rebuttal Comments of the United States Department of Transportation filed in Ex Parte No. 582 (Sub-No. 1).

Paul Samuel Smith

January 11, 2001